PUBLIC PROSECUTOR

v.

LEE CHAN SANG

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI ACTING CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH J
[CRIMINAL APPEAL NO. 9 OF 1988]
20 DECEMBER 1988

CRIMINAL LAW: *Dangerous Drugs - First charge withdrawn in Magistrate's Court - Second charge - Jurisdiction of Magistrate's Court - Case transmitted to High Court - Acquittal by High Court - Plea of autrefois acquit did not apply.*

This was an appeal against the decision of the High Court which acquitted the respondent who was charged for trafficking in 871.63 grams of heroin, a dangerous drug, under s. 39B, Dangerous Drugs Act 1951 (hereinafter referred to as the Act). The respondent had been charged together with three other persons for trafficking in 3,600 grams of heroin. The prosecution withdrew the charge against the respondent and two of the accused persons. The respondent was acquitted and discharged by the Magistrate's Court. The respondent was arrested and charged again for trafficking by negotiating a deal for the disposal of the said drug by the third accused who had been committed to stand trial in the High Court by the Magistrate's Court. The issue was whether the plea of *autrefois acquit* applied.

Held:

[1] The appeal by the prosecution was allowed. The Magistrate's Court had jurisdiction only to receive the production of the accused person, to read the charge and to transmit the case to the High Court without holding a preliminary inquiry as provided by s. 41A, Dangerous Drugs Act 1952. Further, s. 39B(4) provided that the no plea should be entered until the public prosecutor had consented to the prosecution.

[2] The plea of *autrefois acquit* which was enshrined in Article 7(2) of the Federal Constitution did not apply as the respondent had not been tried for the same offence earlier.

[Appeal allowed.]

Legislation referred to:
Criminal Procedure Code, s. 254
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), (3), (4) s. 41(3), 41A
Federal Constitution, arts. 7(2), 145(3)
Penal Code, ss. 34, 254

For the appellant - Gooi Soon Seng, DPP
For the respondent - Manjeet Singh Dhillon (Atma Singh with him)

JUDGMENT

Hashim Yeop Sani Acting CJ (Malaya):

The background of the appeal may be summarised as follows. The respondent was first arrested on 27 November 1983. Subsequently, along with four others the respondent was charged in the Kuala Lumpur Magistrate's Court on 9 December 1983 and the case was registered as ACDO 1107 of 1983. The charge against them was that they jointly on 27

November 1983 at Jalan Ampang, Kuala Lumpur in furtherance of the common intention of them all did traffic in dangerous drugs to wit 3,600 grams of heroin in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") an offence punishable under s. 39B(2) of the Act read with s. 34 of the Penal Code.

On 9 March 1984 all the accused were produced in the same Magistrate's Court. The prosecuting officer withdrew the charge against all except one Lim Kim Thiar against whom an amended charge was preferred also under s. 39B of the Act. On that day the prosecuting officer also tendered a written consent of the Public Prosecutor under s. 39B(3) of the Act. The Magistrate committed the said Lim Kim Thiar for trial in the High Court and acquitted and discharged the rest including the respondent.

In July 1984 the respondent was arrested again and on 16 July 1984 the Public Prosecutor issued a written consent under s. 39B(3) of the Act for his prosecution for an offence of doing an act for the purpose of trafficking in dangerous drugs to wit 871.63 grams of heroin by Lim Kim Thiar by negotiating a deal for the disposal of the said drugs by the said Lim Kim Thiar.

On 11 February 1988 the respondent was produced before Shankar J in the High Court, Kuala Lumpur to face the said charge. Before his plea was taken, his Counsel, Mr. Manjeet Singh made a preliminary submission that *autrefois acquit* applied to his client and that it was not open to the prosecution to proceed with the matter. As stated in his grounds of judgment the learned Judge agreed with this submission and upheld the plea of *autrefois acquit*.

The Public Prosecutor's appeal evolved around the question whether the order of acquittal by the Magistrate was valid. The Public Prosecutor was also dissatisfied with the learned Judge's application of s. 254 of the Criminal Procedure Code to the respondent, and secondly against the learned Judge's ruling that the plea of *autrefois acquit* was available to the respondent.

In our view the answer to this appeal lies simply in the proper interpretation of s. 39B and s. 41A of the Act. Section 41A reads:

> 41A. (1) Where any case in respect of an offence under this Act is **triable exclusively by the High Court** or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate Subordinate Court which **shall**, after the charge has been explained to him, **transmit** the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.
>
> (2) When the accused person appears or is brought before the High Court in accordance with sub-section (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under sub-section (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
>
> (4) The provisions of sub-sections (1), (2) and (3) shall have effect **notwithstanding any other written law to the contrary**.
> (Emphasis provided)

In simple language what that section directs is that notwithstanding any other written law to the contrary, an accused person who is charged with an offence which is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court

shall be produced before the Magistrate's Court where after the charge has been explained to the accused the Magistrate's Court is required to the transmit the case to the High Court without holding a preliminary inquiry.

Section 41A of the Act therefore confers jurisdiction on the Magistrate's Court only in so far as to receive the production of the accused person and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry.

The Magistrate's Court has no jurisdiction even to record a plea of the charge. Indeed s.41(3) of the Act directs that the trial of the case shall be by a Judge of the High Court sitting alone.

Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That sub-section also directs that the case **shall not be further prosecuted until the consent has been obtained**. In respect of the respondent the Public Prosecutor's consent was issued only on 16 July 1984.

Section 39B(4) provides that when a person is brought before a Court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in Article 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the Civil Courts. It is clear from the language of s. 254 of the Criminal Procedure Code both in clause (1) and clause (2) thereof that the power of the Public Prosecutor is exercisable **at any stage of any trial**.

Therefore on a proper reading of ss. 39B and s. 41A of the Dangerous Drugs Act 1952, it is clear that ss. 254 of the Criminal Procedure Code cannot apply to the facts of this case because no trial had commenced before the Magistrate on 9 March 1984.

On the question of the application of the plea of *autrefois acquit* this doctrine is in fact enshrined in Article 7(2) of the Federal Constitution which declares that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a Court superior to that by which he was acquitted or convicted. But *autrefois acquit* means "formerly acquitted". It is a bar to criminal prosecution when the prisoner has already been tried for the same offence before a Court of competent jurisdiction and has been acquitted. We need not cite authorities for this. The plea of *autrefois acquit* can only succeed where the accused was in jeopardy in the first proceeding, that is to say where the merits of the prosecutor's case have been gone into so that the decision of the Court was that the evidence was insufficient to support the prosecution.

We accordingly allowed the appeal by the Public Prosecutor and quashed the order of the learned Judge.

Also found at [1989] 1 CLJ 144